

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT,
ARM 12.11.805, 12.11.3205, the	)	ADOPTION, AND REPEAL
adoption of NEW RULES I through V,	)	
and the repeal of ARM 12.11.3963,	)	
regarding recreational use rules in	)	
Montana	)	

TO: All Concerned Persons

1. On January 27, 2011, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-365 pertaining to the public hearings on the proposed amendment, adoption, and repeal of the above-stated rules at page 83 of the 2011 Montana Administrative Register, Issue Number 2.

2. On February 22 and February 23, 2011 the commission held public hearings to consider the proposed amendment, adoption, and repeal of the above-stated rules.

3. The commission has amended ARM 12.11.805 and 12.11.3205 as proposed.

4. The commission has adopted New Rules II [12.11.3402], III [12.11.3423], IV [12.11.5303], and V [12.11.510] as proposed.

5. The commission has adopted New Rule I [12.11.2206] as follows, stricken matter interlined, new matter underlined:

NEW RULE I [12.11.2206] FLATHEAD RIVER (1) remains as proposed.  
(2) Church Slough is:  
~~(a) closed to boating March 1 to April 10; and~~  
~~(b) restricted to a controlled no wake speed, as defined in ARM 12.11.101(1)~~  
~~from April 11 to the last day of February.~~  
(3) through (6) remain as proposed.

6. The commission has repealed ARM 12.11.3963.

7. The commission has thoroughly considered the comments and testimony received. A summary of the comments received and department's responses are as follows:

Comment 1: The commission received all favorable comments regarding the adoption of the rules on Alvord Lake, Kilbrennan Lake, and the portion of the Flathead River rule that would allow the Department of Fish, Wildlife and Parks (department) wardens to be able to enforce the United States Forest Service Rules.

Response 1: The commission appreciates the interest in this rulemaking process.

Comment 2: The commission received multiple comments in favor of the seasonal closure stating that seasonal closure is necessary to protect the migrating waterfowl. One comment stated the closure is two weeks too short to fully protect the waterfowl. The commission also received multiple comments opposed to the seasonal closure stating it wasn't necessary because use on the slough from March 1 to April 10 is minimal and when boats are present the birds either move or are not bothered by the boats. One person stated instead of adopting the closure, adopt the no wake speed rule to protect migrating waterfowl.

Response 2: Department personnel reported that even the current low boating use displaces large numbers of waterfowl and the closure protects the majority of migrating waterfowl. Department personnel also reported that no wake boating speed limits would not remove impacts to waterfowl. The commission adopted the seasonal boating closure to reduce disturbance to migratory waterfowl and determined that a no wake rule was not required to protect waterfowl the remainder of the year.

Comment 3: The commission received a couple of comments opposed to the adoption of a seasonal closure on Church Slough stating the seasonal closure would restrict anglers from a spring fishing opportunity to take pike that diminish native westslope cutthroat trout and bull trout populations. One person recommended allowing winter spear fishing of pike to help native trout.

Response 3: Pike fishing and harvest is open the entire year on Church Slough. Church Slough is open the entire year to hook and line fishing from shore. The closure will not significantly reduce annual pike harvest or opportunity and native trout populations. The commission addresses fishing regulations, including spear fishing, in a separate process.

Comment 4: The commission received multiple comments in support of adopting the no wake rule on Church Slough stating the rule will enhance water safety on Church Slough, large wakes almost capsize small fishing boats, use of boats designed to produce large wakes will increase in the future degrading natural resources, and the no wake rule will enhance recreational experiences for low impact sports including fishing and kayaking.

Response 4: Department personnel reported there is not a greater incidence of user conflicts or safety concerns than on other waters and that at current use levels safety concerns do not require adoption of the no wake boating rule. The commission strives to minimize restrictions while protecting resources. The commission is aware that some boats are designed to produce large wakes; however, the commission did not adopt the no wake restriction noting that there was neither survey data nor anecdotal evidence that described a rate of erosion or

accelerated erosion due to boating at a wake speed. The commission did not adopt the wake restriction. Existing statutes are still in effect to protect all water recreational sports including but not limited to vessels must be 75 feet from a fisherman or waterfowl hunter (23-2-525, MCA) and cannot make a reckless approach to, depart from, or passage by a dock, ramp, diving board, or float (23-2-523, MCA).

Comment 5: The commission received multiple comments opposing the no wake rule stating Church Slough is a safe place to teach kids to water ski and fish, is a safe alternative to the Flathead River in early summer due to debris in the river, and crowding is not an issue.

Response 5: The commission published the proposed rules in response to a petition submitted to address erosion concerns. The local department enforcement personnel reported that Church Slough does not have a greater incidence of user conflicts or safety concerns than on other waters.

Comment 6: The commission received multiple comments in favor of the no wake rule on Church Slough stating many forces cause erosion but boat wakes are the only force people can control, shoreline vegetation is being severely impacted, reducing bank erosion will help landowners by reducing costly bank repair and damage, boat wakes cause bank erosion on sloughs degrading resources, and high speed boats can use other water for high speed activities where bank erosion is not a problem.

Response 6: The commission did not adopt the no wake rule because multiple forces cause bank erosion including land management, dam operations, wind waves, river current, and boat wakes. The department has not conducted a study to evaluate the relative contribution of these factors to bank erosion or to assess the rate of erosion on Church Slough. The commission strives to minimize restrictions on recreation while protecting public resources.

Comment 7: The commission received multiple comments opposed to the no wake rule on Church Slough stating there is not significant erosion due to boating, there is no scientific data collected about bank erosion on Church Slough, bank erosion is inevitable and natural and a no wake rule will not stop bank erosion, and multiple factors contribute to bank erosion. Some stated that a no wake rule is too restrictive, reducing recreational opportunity for future generations, and infringes upon the rights of citizens and landowners.

Response 7: Please refer to Response 13. Department personnel reported that most landowners on Fennon Slough addressed bank erosion on the slough banks with stabilization projects permitted under the Montana Natural Stream Bed and Land Preservation Act. Landowners petitioned the department for the no wake rule to reduce erosion of property. Landowners and others provided anecdotal accounts and observations of excessive erosion due to boat wakes.

Comment 8: The commission received several comments in support of adopting the no wake rule on Fennon Slough for reasons including drastic increase in the rate of bank erosion due to increased boat use, the bank soils are defenseless to wake erosion because they lack rock, stones, or gravel, and boat wakes from large vessels exceed the two or three feet of riprap along the banks of the river.

Response 8: The commission adopted the no wake rule on Fennon Slough to address a petition submitted by landowners. The landowner petition and multiple public comments contend that boat wakes are causing excessive bank erosion and degradation of water quality. Fennon Slough receives a high level of boat use due to the close proximity of popular public access sites and a large private marina and the banks consist of highly erosive soils.

Comment 9: One person suggested the United States Fish and Wildlife Service revisit its restriction on the north end of Flathead Lake for waterfowl hunting.

Response 9: United States Fish and Wildlife Service (service) regulations are not within the scope of the commission's or department's authority and any recommendations to those rules need to be addressed to the service.

Comment 10: One person stated that boaters who push the limits and abuse the privilege to boat should be dealt with by law enforcement.

Response 10: Department enforcement personnel currently patrol these waters and are available to address complaints.

Comment 11: One person stated personal watercraft is the most offensive boating operation.

Response 11: The proposed amendments did not address any use of a specific type of watercraft.

Comment 12: One person stated that wake boarding is currently not a problem and nonmotorized use can coexist with motorized use.

Response 12: Boating at wake speeds can displace use by anglers and nonmotorized users and increase wake boarding in the future could increase the potential for bank erosion. The commission recognizes that the current level of conflict between nonmotorized and motorized boat use does not require restricting recreational use and therefore did not adopt the speed restriction.

Comment 13: One person stated at the hearing that wake boarding boats with loud stereos and personal watercraft are creating annoying noise levels, infringing on landowner civil rights and decreasing property value. One person responded that noise is not a problem and boating occurs during middle of the day.

Response 13: The commission published the proposed rules in response to a petition submitted to address erosion concerns and would have no effect on noise restrictions. Motorboats and personal watercraft may not exceed 86 decibels measured at a distance of 50 feet and not in excess of 90 decibels at 3 feet from the muffler.

Comment 14: Two people stated that they were in support of a no wake rule because turbidity from boat wake erosion is affecting fish reproduction and health and the quality of the fishery has declined due to erosion.

Response 14: The department is unaware of fish monitoring data validating an affect on fish reproduction and health or a decline in the fishery.

Comment 15: One comment stated that most of the boating use is by fisherman and not bird watchers and that more bank damage is due to fisherman wakes then by water skier wakes.

Response 15: The commission considers any amount of erosion in its decision to adopt recreational use rules regardless of the cause.

Comment 16: One person stated boat wakes cause bank erosion threatening habitat that conservation easements were meant to protect.

Response 16: Multiple forces cause bank erosion including land management, dam operations, wind waves, river, current, and boat wakes. The department has not conducted a study to assess the relative contribution of these to bank erosion in Church Slough. The department supports the conservation values protected by another organization's conservation easement in this area.

Comment 17: The commission received several comments stating the department should increase educational efforts to reduce boating impacts, including educating boaters on how to safely boat and respect other users and the land to minimize problems.

Response 17: The department wardens inform boaters of boating rules and safe boating practices and will continue to patrol these waters and be available to address complaints.

Comment 18: A few people suggest that other alternatives for boating restrictions should be considered.

Response 18: The commission published the proposed rules in response to language submitted in a petition to address erosion concerns.

Comment 19: One comment stated the department plays into the wishes of people who do not buy hunting or fishing licenses instead of enhancing opportunities for all.

Response 19: The commission and department adopt and enforce all rules equally to everyone and strive to minimize restrictions while protecting resources.

Comment 20: One comment stated that adoption of restrictions on Church Slough will create a need for more enforcement and signing will be needed and suggested money collected from fines to pay for enforcement.

Response 20: The seasonal closure will be published in the next publication of boating regulations and department personnel will provide public notice and education regarding boating regulations. By statute, the department does not receive money from fines levied for a violation of a no wake boating rule.

Comment 21: The commission received several comments stating that private property values will decline if boaters cannot navigate the slough at a wake speed.

Response 21: Church Slough is a public resource and a rule restricting recreational use on that public resource will not affect private property values.

Comment 22: One comment stated boating negatively impacts native birds, mammals, reptile, and amphibians forcing them into backwaters.

Response 22: The commission recognizes that boating can displace migrating waterfowl and adopted a seasonal closure to boating when large numbers of migratory birds use the slough.

Comment 23: One comment questioned how a group could propose restriction on landowners along the slough.

Response 23: Section 2-4-315, MCA, states that an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. The commission and department adopt and enforce all rules equally to everyone.

Comment 24: One person stated the Church Slough and Fennon Slough should be controlled in the same manner so that use of one will not adversely affect the other.

Response 24: The commission considered two petitions individually. The commission adopted the seasonal closure on Church Slough to protect migratory waterfowl that use the slough but did not adopt the no wake rule. Church Slough is less accessible and a majority of landowners did not contend that boating was causing excessive bank erosion. Fennon Slough receives a high level of boat use due to the close proximity of public access sites and a large private marina. The petition submitted by landowners and comments stated that boat wakes are causing bank erosion. Restrictions on Fennon Slough may not lead to increased use on Church Slough.

Comment 25: The commission received several comments stating the Flathead County boat access has the number of large horsepower boats and water skiers creating a dangerous situation. One person stated there is a lack of enforcement of the county horsepower restriction and another person stated that the horsepower restriction will be unnecessary if the commission adopts the no wake rule.

Response 25: Department surveys have demonstrated the number of boats on the river and sloughs have doubled between the 2002 and 2008 surveys which are prior to Flathead County building the boat ramp. Department personnel reported that there is not a greater incidence of user conflicts or safety concerns than on other waters. Department personnel cannot enforce Flathead County's restrictions.

Comment 26: One comment suggested the department had a plan to restrict wake speed boating by allowing the county to build a boat ramp to increase boat use to justify speed boating on the sloughs.

Response 26: The department did grant Flathead County a 124 permit for construction of its boat ramp. The commission considered two petitions individually. The commission adopted the seasonal closure on Church Slough to protect migratory waterfowl that use the slough but did not adopt the no wake rule. Church Slough is less accessible and a majority of landowners did not contend that boating was causing excessive bank erosion. Fennon Slough receives a high level of boat use due to the close proximity of public access sites and a large private marina. The petition submitted by landowners and comments stated that boat wakes are causing bank erosion.

Comment 27: The commission received several comments suggesting the commission exempt landowners from a no wake restriction. Several comments stated that exempting landowners from rules was unfair. One person suggested that before limiting boating speed, the department should limit public access.

Response 27: The commission recognizes that the river and its sloughs are public waters and that boating rules apply to all boaters. The commission is not exempting landowners from the no wake restriction adopted on Fennon Slough. The commission only has the authority to regulate the recreational use of the water including whether to a speed restriction or a complete closure would apply to all boaters.

Comment 28: The commission received several comments stating a need for boating restrictions on the entire river system. The commission received several comments stating a concern that adopting restrictions would set a precedence leading to more unwanted restrictions on the entire river system.

Response 28: The commission considered the proposed rule changes contained in two individual petitions. The commission did not consider boating

regulations on the larger river system and is unaware of any petitions for restriction on the Flathead River.

Comment 29: The commission received multiple comments stating that boat use has increased on the sloughs in recent years.

Response 29: The department conducted boating surveys in 1992, 2002, and 2008 that show a large increase in boating on the Flathead River and sloughs.

Comment 30: The commission received a couple of comments stating that a study should be done on the river and slough to access the rate of erosion and causes of erosion, effects of boat wakes, and effectiveness of restrictions.

Response 30: The department does not generally engage in studies of this type and instead relies upon the best available information including data collected by other agencies. The department does not have any plans to study the rate and causes of soil erosion on the river and sloughs in question.

Comment 31: One person noted that it is a one and a half mile boat ride from his house on Fennon Slough to the Flathead River and it would take a significant time period when traveling at no wake speeds to reach the river.

Response 31: The commission adopted the no wake restriction on Fennon Slough to protect the resources from erosion. The commission recognizes that traveling at a no wake speed will be slower and require more time to travel.

/s/ Bob Ream  
Bob Ream, Chairman  
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter  
Rebecca Jakes Dockter  
Rule Reviewer

Certified to the Secretary of State May 16, 2011